No. 52

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BRUSH ELECTRIC COMPANY,
CALIFORNIA ELECTRIC LIGHT CO.,
SAN JOSE LIGHT AND POWER CO.,

Complainants,

vs.

ELECTRIC IMPROVEMENT COMPANY OF SAN JOSE,

Defendant.

Brief on Motion to Dismiss Appeal.

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Brief on Motion to Dismiss Appeal.

The motion of appellees to dismiss our appeal is based on the ground that the order of January 18, 1892, refusing to dismiss the Brush Electric Company from the bill, is not appealable; that is, that the order is not a final order.

The facts are these: A bill was filed in the Circuit Court to enjoin an infringement of a patent. The bill was entitled: *Brush Electric Company, California Electric Light Co., San Jose Light and Power Co.*, vs. *The Electric Improvement Co. of San Jose.*

The Brush Electric Company, the owner of the patent, moved to be dismissed from the suit, because it was begun without its authority, and it had never given any consent to any one to use its name in this litigation, and it didn't desire to press the case.

Its co-plaintiff, the California Electric Light Company, objected, and affidavits were filed showing that the California Electric Light Company was the licensee of the Brush Electric Company, and the Light and Power Company was its sub-licensee, but without its consent, and that the California Electric Light Company had no interest in the case.

The Court refused to dismiss the Brush Electric Company from the suit, and decided that the California Electric Light Company

had the right to the use of its name in this suit, and that the Brush Electric Company should have no control over nor interest in the suit.

From this order an appeal has been taken.

Since *Forgay* vs. *Conrad*, 6 How., 204, the Supreme Court has many times repeated the doctrine that a final decision is one where the controversy of the parties as to the merits is terminated, but no case like the one at bar has ever arisen, and in every instance where the Court has refused to entertain an appeal, the parties have been on the opposite side of the record, and the decree has been simply interlocutory ; but many appeals have been entertained where the matter adjudged was final as to that point, although there remained others to be decided, and the State Courts under a similar statute have given a like interpretation to a like statute, to prevent injustice.

The language of the Act creating this Hon. Court, in Section 6, Act of March, 1891, says :

" The Circuit Court of Appeals shall exercise appellate juris-
" diction to review by appeal or by writ of error *any final deci-*
" *sion*," etc.

The Statute does not say that an appeal lies from *the* final decision, but from *any* final *decision*, thus contemplating what is well known in equity, viz., that there may more than one final decision in a cause.

In *Stich* vs. *Goldner*, 38 Cal., 609, the plaintiff sued defendant Dickenson to foreclose a mortgage. He denied that plaintiff was the owner of the note and mortgage. Goldner filed a complaint in intervention, Dickenson demurred to the intervention and the demurrer was sustained, and judgment was thereupon entered against the intervenor, and he appealed.

The respondents claimed that the appeal was premature, and asked to have it dismissed, as no final judgment had been given in the case. The Court said: " This position was untenable, that
" there had been a final judgment against the intervenor ; so
" far as he was concerned the judgment was final and ended the
" litigation in that Court." The same point was ruled the same day in

People vs. *Pfeiffer*, 59 Cal., 90.
Coburn vs. *Smart*, 53 Cal., 743, and
Henry vs. *Travellers' Ins. Co.*, 26 P. R., 319 (Colo.)

In *Bronson* vs. *R. R. Company,* 2 Black, 529, a motion was made to dismiss the appeal because there was no final decree within the meaning of the Act giving the Court jurisdiction.

Some exceptions to the report of the master were pending and undetermined when the decree was made. Davis, J., commenting on the contention of defendants that there had been no final decree, and on the injury to plaintiffs if the appeal was refused, said : "A rule from which consequences so injurious to " the rights of parties litigant would necessarily result, has " never received the sanction of this Court. This decree is not " final in the technical sense of the word, for something yet re- " mains for the Court below to do.

" But it was said by Chief Justice Taney in *Forgay* vs. *Conrad,* " 6 How., 203, this Court has not therefore understood the words " 'final decree' in this strict technical sense, but has given to " them a more liberal, and as we think a more reasonable, con- " struction, and one more consonant to the intention of the " Legislature."

And the appeal was sustained, because it determined the merits of the litigation as far as the appellant could control it.

In *Thomson* vs. *Dean,* 7 Wal., 345, it was held that an appeal lay because the decree determined the principal matter in controversy between the parties ; and that since it could not be changed, except by a new and distinct proceeding, it determined that matter finally.

Trustees vs. *Greenough,* 105 U. S., 527, is an instructive case on the right of appeal, and has been repeatedly approved. Concisely the case is this:

In 1870 a bill was filed by Vose, a bond holder, against the trustees of the Florida Improvement Fund *et al.,* to set aside certain fraudulent conveyances. By decree the management of the fund was taken out of the trustees, and large sums of money were divided among the bond holders. Vose had borne the whole burden of the litigation, and had advanced all the expenses. In 1875 he filed a petition in the suit showing these facts, and prayed for reimbursement out of the fund. The report was confirmed in part, and from this order an appeal was taken. At that time the litigation was undetermined.

It was urged that this order was not a final decree determining the merits of the litigation between the parties, and hence

not appealable. The Court, at page 531, answered the contention saying: "The order is certainly a final determination of "the particular matter arising upon the petition for allowance. "Though incidental to the cause the inquiry was a collateral "one, having a distinct and independent character, and receiv-"ing a final decision that the main suit might continue for "years. That the case is a peculiar one, it is true, but under all "the circustances we think that the proceedings may be regard-"ed as so far independent as to make the decision substantially "a final decree for the purposes of an appeal."

In *Williams* vs. *Moryan*, 111 U. S., 669, the Court again, speaking of an appeal from an order fixing the fee of a trustee in an unfinished case, said: "It was in its nature final, and was "made in a matter distinct from the general subject of litiga-"tion, a matter by itself which affected only the *parties* to the "*particular controversy*."

In *Terry* vs. *Sharon*, 131 U. S., 46, after the decree of the Circuit Court Sharon died, and F. W. Sharon, his executor, filed a bill of reviver. To this bill the defendant Terry demurred. The demurrer was overruled, and from the order Terry appealed.

A motion to dismiss the appeal was made, because the order was not appealable; but Mr. Justice Miller denied the motion, because, as he said, "the order which the Court made was so *es-"sentially decisive and important* that the Court did not doubt "that it was appealable."

Trust Company vs. *Grant Locomotive Works*, 135 U. S., 209, seems to us conclusive as to our right to maintain an appeal.

Here, before any decree whatever in the main cause, on an *ex parte* application, certain orders were made directing certain property involved in the litigation to be delivered to an intervenor, the plaintiff appealed, and, on motion to dismiss, Chief Justice Fuller, speaking for the Court, said (page 224): "They "were final in their nature, and made upon matters distinct "from the general subject of litigation."

The last case in the Federal Courts illustrative of our position is decided by the Fifth Circuit Court of Appeals, viz., *Central Trust Company* vs. *Marietta and N. G. Ry. Co.*, 48 Fed. R., 851.

In this decision the last cited case is approved. The facts were similar, and the Court again reaffirmed the well-settled doctrine that wherever a final decision is made on matters dis-

tinct from the general subject of the litigation affecting any party to the Record, whether such party is on the same or different sides, an appeal will lie by the party injured.

It will be noticed that all of these decisions contemplate and assume that in every case there may be more than one final decree, and, also, that the reason of the rule allowing an appeal from an order made upon matters distinct from the general subject of litigation applies equally, if not more forcibly, to us; for if we cannot appeal from this order we are without remedy against the wrong which may be done us, and, helpless in the hands of our enemies, we will be forced to see our valuable rights destroyed without an opportunity to protest or to be heard, since, if the decree be in favor of the complainants, there must be judgment that we have authorized and consented to the assignment to the San Jose Light and Power Company. If in favor of the defendant, then our valuable patent rights may be adjudged void.

And thus we will be injured in any event, because we are parties to the bill and must be concluded by the issues raised in the pleadings; but in the language of Justice Davis, in 2 Black, 530:

"A rule from which consequences so injurious to the rights of " parties litigant would necessarily result has never received the " sanction of this Court."

The adjudications in the State Courts are equally favorable to our right to maintain this appeal.

The Kentucky Court of Appeals have decided the exact question in our favor, in the case of *May* vs. *Hardin's Ex.*, 13 B. Monroe, 344. The reasoning of Judge Marshall is so clear, convincing and pointedly applicable that I trust the Court will pardon me for quoting a little therefrom:

" The facts recited in the opinion were, that May and wife, be-" ing in possession of a note for $500.00, executed by C. Cambion " to Hardin, deceased, but without indorsement or assignment to " them, caused suit to be brought upon it by petition in the " name of Hardin's executors, who (as the petition stated) sued " for the use of May and wife. Before judgment was rendered " thereon, the executors, upon affidavit, obtained a rule upon " May and wife and their attorneys to show by what authority " they prosecuted the suit, and that they, the executors, be al-

" lowed to control the action. The rule was discharged as to the " attorneys, upon it being shown that they were employed by " the parties in possession of the note. May and wife filed a " bond to indemnify the executors against cost, and made an in- " effectual resistance to the rule. The rule was made absolute " and that the executors should control the suit and judgment " to be rendered therein."

An appeal was taken by May and wife. The cpinion of the learned judge, after reciting these facts, continues thus:

"As the executors were the legal plaintiffs in the suit, " and are made to say in the petition that they sue for the use " and benefit of May and wife, and thus, to concede to them the " benefit and control of the suit, with the right to receive its pro- " ceeds, it seems clear, that if this avowal be false and unauthorized, " and not, in fact, made either with their sanction or in virtue of a " beneficial interest in the note, they should have some remedy in " the suit itself, and directly affecting its form and condition, as by " dismissal, amendment or otherwise, to be relieved from the effect " of this false statement and be placed in a condition in which " they might assert their right in an action for the note or have " the control of the suit brought upon it. And, as in any of " these remedies, the opposing claimant should have an oppor- " tunity of being heard, there would necessarily arise a collateral " controversy in the form of a judicial proceeding.

"And even if it be true, which, however, we do not decide, that " the decision of this question would not be conclusive upon the " parties, in a contest for the proceeds of the suit received by one " of them, still *it is a final determination* of the *immediate motion*, " or rule, *conclusive upon* them, so far as *this suit is concerned,* and " as it materially affects the rights and interests of the parties, " and is obviously prejudicial to the party against whom it is er- " roneously decided, we are of the opinion that the decision of " such a question is a final order which this Court has jurisdic- " tion to revise, by appeal or 'writ of error.'"

The order refusing to dismiss us from the bill disposed of the entire controversy between us and the California Electric Light Company and the Light and Power Co.

In *Sharon* vs. *Sharon,* 67 Cal., 195 and 196, the question as to what was an appealable order was elaborately discussed, and some remarks in that case are very expressive in the light of the

facts of this. In speaking of the order allowing temporary alimony the Court uses this language:

" Its validity would not depend in any way on the result of
" the action. It is final upon the question adjudicated in it and
" the order is a final judgment upon all the questions adjudicated
" in it."

" A final judgment is not necessarily the last one in an action.
" A judgment that is conclusive upon any question in a case is
" final as to that question. The Code provides for an appeal
" from *a* final, not from *the* final, judgment in an action."

This case has been approved in this particular by the Supreme Court of Colorado.

Daniels vs. *Daniels*, 10 P. R., 661.

In New York we find similar decisions:

Strobridge Lith. Co. vs. *Crane*, 12 N. Y., Supp., 835.

An application was made by a third person to become a party to the suit, and it was denied and from this order an appeal was allowed.

Stephens vs. *Hall*, 10 N. Y., Supp., 753, a party to the action was dismissed from the suit without notice and an appeal was allowed therefrom.

And since the order refusing to dismiss us from the bill is final as to us, and is a final adjudication of our right both to control the suit, and also to ignore the assignment of our license to the Light and Power Company; and since all our rights between us and our co-plaintiffs have in this litigation and suit been finally determined, we submit that the order is appealable.

EDWARD P. COLE,

Solicitor for Appellant.